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IN THE

Supreme Court Of The United States

October Term, 1973

NO. 73-933

K. G. PARSONS, IVA E. PARSONS, *et al.*,
Petitioners,

v.

OTHO W. KNOPP AND NAOMI M. KNOPP,
Respondents,

PETITION FOR REHEARING UPON THE WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

LEO CATSONIS
CATSONIS & LINKOUS
207 Security Building
Charleston, West Virginia 25301
Counsel for Petitioners

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GROUNDS FOR REHEARING

Petitioners respectfully represent unto this Honorable Court that the intervening case of *Pernell* v. *Southall Realty*, 94 S. Ct. 1723, decided on April 24, 1974, subsequent to the filing of the original petition for writ of certiorari in December, 1973, and therefor not previously presented, contains similar issues of substantial and controlling effect relative to the petition herein. Therefore, petitioners respectfully request a rehearing pursuant to Rule 58, Supreme Court Rules.

STATEMENT OF THE CASE

On December 17, 1973, the petitioners filed a petition for a writ of certiorari to the Supreme Court of Appeals of West Virginia pursuant to jurisdiction granted by 28 U. S. C. §1257 (3). The questions presented in that petition were:

> "1. Whether petitioners were denied their Seventh Amendment right to trial by jury in all civil cases.
>
> "2. Whether West Virginia appellate procedure denied petitioners due process and equal protection of the laws, as guaranteed by the Ninth and Fourteenth Amendments, in that petitioners were effectively denied an appeal as a matter of right." (Original Petition, p. 2).

Petitioners' basic contention was that the proceeding in the trial court was in the nature of ejectment or ouster of persons from land and therefore afforded petitioners a Seventh Amendment right to trial by jury.

On May 28, 1974, this Court denied the petition for writ of certiorari and the petitioners now request a rehearing pursuant to Rule 58, Supreme Court Rules.

ARGUMENT

The original petition for writ of certiorari herein was filed prior to the reporting of the two intervening United States Supreme Court decisions dealing directly with the issue of Seventh Amendment right to trial by jury as raised in the original petition. The two

cases are: *Pernell* v. *Southall Realty*, 94 S. Ct. 1723 (1974) and *Curtis* v. *Loether*, 94 S. Ct. 1005 (1974).

The suit in *Pernell* v. *Southall Realty, supra*, was in the nature of ejectment or eviction as is the case at bar. Pernell was a tenant of Southall Realty and upon a rent default, Southall Realty instituted a statutory proceeding for ejectment and recovery of the real property occupied by Pernell. Pernell answered by asserting breach of contract and unsafe premises of the part of the plaintiff. A trial by jury was demanded by the defendant Pernell in his answer. The trial judge struck the jury trial request, however, and tried the case himself, subsequently entering judgment for Southall Realty. The Court of Appeals, in affirming the District Court's decision, held that jury trials are not afforded in such cases involving repossession of the premises in question.

This Court, in noting that the District of Columbia statute preserving the right to trial by jury had been repealed, granted certiorari to Pernell on the Seventh Amendment question. At page 1727, after discussing its jurisdiction to review the District of Columbia case, the Court began its treatment of the Constitutional issues:

> "The Seventh Amendment provides: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .'
>
> "*This Court has long assumed that actions to recover land, like actions for damages to a person or property, are actions at law triable to a jury.* In *Whitehead* v. *Shattuck*, 138 U. S. 146, 151, 11

S. Ct. 277, 34 L. Ed. 873 (1891), for example, we recognized 'it would be difficult and perhaps impossible, to state any general rule which would determine in all cases what should be deemed a suit in equity as distinguished from an action at law . . .; but this may be said, that *where an action is simply for the recovery and possession of specific, real, or personal property, or for the recovery of a money judgment, the action is one at law.*'" (Emphasis supplied).

As in the instant case, the respondent in *Pernell* argued that there is a distinction to be made between actions involving title issues and actions to repossess. However, in reviewing the common law history and nature of the causes of action questioned herein, Justice Marshall made the following comments:

"The distinction between title to and possession of property, of course, was well recognized at common law. . . . But, however, it was for certain purposes, it had no bearing on the right to a jury trial. *The various forms of action which the common law developed for the recovery of possession of real property were also actions at law in which trial by jury was afforded.*

"Writs of entry . . . were developed to encompass situations not covered by the assize of novel disseisin. Novel disseisin, for example was applicable only where the defendant gained possession wrongfully by putting the plaintiff out of seisin. Writs of entry, in contract, permitted recovery where the defendant entered into possession lawfully but no longer had rightful possession . . . the writ of entry *ad terminum qui praeterit* . . . embodied a cause of action quite similar to that encompassed in §16-1501 (D. C. Code real estate

repossession provision). *Significantly for present purposes, it is clear that either party could demand a jury trial.*

"Ejectment originated as a very narrow remedy . . . but *eventually developed into the primary means of trying either the title to or the right to possession of real property. . . . And . . . questions of fact arising in an ejectment action were resolved by a jury.*" (Emphasis supplied).

The nature of the relief sought in the trial court has been strictly categorized as a deed reformation action by the respondents. However, the nature of relief actually sought in the complaint is basically one which seeks to oust the petitioners from specific land and to clear the title thereto. As noted in the original petition herein, at page 6, a West Virginia Code provision, Chapter 55, Article 4, 1931, as amended, applies to actions of ejectments, ouster, and similar remedies. West Virginia Code, 55-4, *et seq.* and the D. C. Code provision in *Pernell* v. *Southall Realty, supra*, are not dissimilar. The respondents in *Pernell*, as in the instant case, argued that these statutory remedies are not the equivalent of ejectment as known at common law. This Court rejected that argument, at page 1729 of the *Pernell* opinion, by saying:

"In our view, this analysis is fundamentally at odds with the test we have formulated for resolving Seventh Amendment questions. We recently had occasion to note that *while 'the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common law forms of action recognized at that time.' Curtis* v. *Loether*, ... U. S. ....., 94 S. Ct. 1005, 1007, 39 L.

Ed. 2d 260 (1974). The phrase 'suits at common law' includes not only suits 'which the common law recognized . . . but suits in which legal rights were to be ascertained and determined. . . .'

"Whether or not a close equivalent to §16-1501 (D. C. C. E.) existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty. . . ." citing *Curtis* v. *Loether*, *supra*. (Emphasis supplied).

CONCLUSION

Both the *Pernell* case and *Curtis* v. *Loether* make reference to *Ross* v. *Bernhard*, 396 U. S. 531, 90 S. Ct. 733, 24 L. Ed. 2d 729 (1970). The petitioners herein cited extensively from the *Ross* opinion on pages 8 through 11 of the original petition. Respondents have failed to adequately meet the holding of *Ross* and in light of the two recent cases discussed herein, it is obvious that further determination of the constitutional issue of trial by jury be allowed.

CERTIFICATE OF GOOD FAITH

I, LEO CATSONIS, one of the attorneys for the petitioners, and a member of the bar of the Supreme Court of the United States, hereby certify that the petition for a rehearing herein is pursued in good faith and not for any purposes of delay whatsoever. Further, I certify that the petition for rehearing is restricted to the grounds as set forth by counsel herein.

LEO CATSONIS
CATSONIS & LINKOUS
207 Security Building
Charleston, West Virginia 25301

Of Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Leo Catsonis, one of the attorneys for the petitioners, and a member of the bar of The Supreme Court of The United States, hereby certify that, on the 21st day of June, 1974, I served three copies of the foregoing Petition for a Writ of Certiorari on The Respondents by depositing same in a United States mail box, with postage prepaid, addressed to counsel of record for the Respondents, Orton A. Jones, Esquire, 216 Market Street, Spencer, West Virginia 25276. I further certify that all parties required to be served have been served.

LEO CATSONIS
CATSONIS & LINKOUS
207 Security Building
Charleston, West Virginia 25301

Of Counsel for Petitioners